United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1318

To be argued by
DAVID S. GOULD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1318

B P/S

UNITED STATES OF AMERICA,

Appellee,

—*against*—

STEPHEN ROSENBAUM,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Appellant, Stephen Rosenbaum, appeals from a judgment of conviction in the United States District Court for the Eastern District of New York (Dooling, *J.*) entered on April 14, 1976 after a jury trial. Appellant was convicted of one count of violating 18 U.S.C. § 371 by conspiring to give bribes and gratuities to officials of the Veterans Administration, one count of violating 18 U.S.C. § 201(f) by giving a gratuity to the Director of the Hempstead Insuring Office of the Federal Housing Administration ("FHA"), and one count of violating 18 U.S.C. § 371 by conspiring to give gratuities to officials of the FHA. Appellant was acquitted by the jury of one count of violating 18 U.S.C. § 201(b) by offering a bribe to an employee of the FHA.

On June 18, 1976, appellant was sentenced to two years on each count, pursuant to the provisions of 18 U.S.C. § 3651; to be confined for four months and execution of the remainder of the sentence, twenty months, was suspended. He was placed on three years' probation, and the prison sentences on each count were to run concurrently. In addition, he was fined $2500 on Count One.

On this appeal appellant raises three issues. First, appellant contends that a conspiracy count does not lie where the underlying substantive crimes, i.e., bribery and giving a gratuity, require a concert of action. Therefore, he claims his conviction on the counts charging appellant with conspiracies to bribe and give gratuities to officials of the VA (Count One) and to give gratuities to FHA officials (Count Four) should be reversed and the counts dismissed. Secondly, he challenges the sufficiency of the evidence to support the verdict under Count Two of the indictment which charged appellant with giving an unlawful gratuity to an official of the FHA in violation of 18 U.S.C. § 201(f). Third, he claims a denial of Due Process of Law under the Fifth Amendment by the three and a half year period that elapsed from the time appellant initially became aware that he was under investigation until the indictment was filed in the instant case.

Statement of Facts

A. Introduction

The proof at trial showed that appellant, as the officer in charge of the day-to-day operations of a federally certified mortgage company (Springfield Equities Ltd.), directed an extensive and wide ranging scheme to thwart the lawful operation of the loan guarantee programs of the FHA and VA. The scheme involved bribery and the paying of gratuities to VA officials, the giving of gratu-

ities to FHA officials, and the submission to the FHA and VA of mortgage applications containing false statements. These illegal activities continued for at least three years.

The Government presented its case primarily through twenty witnesses, who included speculators, brokers, fedederal employees, Springfield employees and expert witneses.[1] Also introduced into evidence was a voluminous

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[1] Although the sufficiency of the evidence to support the convictions on Counts One and Four is not challenged by appellant, the following is an alphabetical witness list provided for the Court's convenience in identifying the Government witnesses in the instant case.

Sid Ackerman—Government expert on FHA procedures and policies;

Sanford Allinson—President of Springfield Equities Ltd.;

Charles Assatlee–Assignment clerk employed by the VA;

Samuel Berman—Speculator approached to do business by appellant;

Don Carroll—Former Director of the Hempstead Insuring office of the FHA;

Martin Cohen—Husband of Rose Cohen;

Rose Cohen—Assignment Clerk of FHA;

Nick Corsello—Servicing director for Springfield Equities Ltd.;

Sonny Farinella—Speculator doing business with Springfield Equities Ltd.;

Al Grace—Government expert on VA procedures and policies;

Douglas Holmberg—Expediter for Springfield Equities Ltd.;

Irv Jablon—Employee of Samuel Berman;

Tom Jones–Undercover FBI Agent posing as a buyer for a VA insured home;

Ortrud Kapraki—Speculator doing business with Springfield Equities Ltd.;

Dan Kelleher—Case Agent and Government accounting expert;

Harold Kessler—Fee appraiser employed by VA;

Hugh McDonnell—Assistant Chief of Valuation, employed by the VA;

Bertha Rady—Credit Clerk at FHA;

Pauline Schlam—Appellant's personal secretary and general supervisor for Springfield Equities Ltd.;

Alonzo Smith—Speculator doing business with Springfield Equities Ltd.

amount of documentary evidence, i.e., FHA, VA and Springfield case files, checks, Springfield books and records, and witnesses' personal records. In addition, also admitted into evidence were five consensual tape recordings of the following conversations: two conversations between appellant and Don Carroll, a key prosecution witness; two conversations between appellant and Samuel Berman, another key government witness, and an FBI agent who was posing as an applicant for VA insured housing; and one conversation between Samuel Berman and Pauline Schlam, another government witness.

Appellant did not present a defense.

B. Background of the scheme

Sidney Ackerman, a Government expert in FHA procedures provided the backdrop for the wideranging fraud which was revealed at the trial and which was the world of real estate transactions involving federally insured one-to-four family dwellings. (41-127)[2] The goal of the FHA in this area was to make housing available to low and middle income groups, which were ineligible for and thus could not obtain conventional financing. However, an FHA-approved house would be insured for almost one-hundred percent of the value placed on it by an FHA appraiser,[3] thus protecting the mortgagee if the mortgagor defaulted. Thus the mortgagee, in this instance Springfield, would be fully protected and would provide the requested financing to this high-risk class.

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[2] All citations are to the trial transcript unless otherwise noted.

[3] The mortgage companies did not wish to issue a mortgage greater than the insurance coverage so, in effect, the FHA appraisal value became the selling price of the house.

There were two major steps involved in securing an FHA mortgage, one involving the house which was to be insured and the other involving the buyer who was to purchase the house. Both the house and the buyer had to meet federal standards, and if either failed to do so, the FHA would not issue the insurance. First, a home owner would seek an FHA appraisal of a house which he wished to sell to a person requiring FHA insurance. Usually, such a house was owned by a "speculator", that is a person who bought the house at a very low price anticipating resale a short time later for a significantly higher price. The FHA would select an appraiser at random from the appraisers assigned to the designated geographic area. Initially, the appraiser was required to determine whether the house qualified for FHA insurance and this qualification would be made conditional on certain repairs being made on the house. In any event, the appraiser would then evaluate the house and issue a conditional commitment, which meant that the FHA would insure the house at the appraised value if repairs were completed and the buyer's credit approved.

Approval of the buyer's credit was the second step. The buyer had to establish financial stability to insure that he could meet the mortgage payments. To prove this, the buyer was required to submit a substantial credit analysis which would be verified by the mortgage company and a credit agency which had been selected by the mortgage company to investigate the buyer's credit. If after submission to the FHA the buyer's credit was approved, the file would be closed in the offices of the supervising mortgage company, which company would then usually service the mortgage. Such servicing included collecting of mortgage payments and related supervision of the handling of the mortgage. If market conditions were favorable, the mortgage company would

sell the mortgages to banks or to semi-autonomous Government agencies which were able to purchase such mortgages.

It is essential to emphasize that the entire FHA transaction was supervised from start to finish by the federally certified mortgage company upon which the FHA relied to make sure that the transaction was conducted smoothly and legally. The mortgage company had to execute certain FHA documents certifying that the repairs had been completed, that the credit information was accurate, and that other representations made to the FHA were true.

The lifeblood of the mortgage companies were the speculators (who were often also real estate brokers) who brought them large numbers of "deals" to process. The mortgage companies made their major profits by charging "points" to the speculators. In many instances, the mortgage companies even lent money (interim financing) at very high interest rates to the speculators to purchase the houses in the first instance. Of course, the speculators would use the mortgage company that could provide them with the best services, that is, process cases through the FHA quickly, at a high value, and with a minimum of problems. Such companies, naturally received most of the business.

The VA insurance program was run in a manner similar to the FHA program. However, a special requirement of the VA program was that the prospective buyer be a veteran (131). In addition, it insured only 60% of the appraised value of the house up to $12,500 (131)[4] as contrasted with the FHA's almost 100% insurance.

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[4] The VA insurance program became especially popular after the Government investigation made the FHA "hot as a pistol" (1390).

The profits to be made from participation in the FHA or VA program were enormous. For instance, in one transaction testified to at trial, a speculator bought three houses for $16,000 and a few months later sold just one of the houses for $20,000 (1031). With such potential profits the competition for the business was furious. Unfortunately, Springfield, as described below in detail, chose to compete by offering illegal as well as legal services to attract speculators.

C. Rosenbaum's role

The President of Springfield, Sanford Allinson, mainly a figurehead (1025, 1111, 1114, 1195), had provided much needed capital for the company in its formative years. However, on a day-to-day basis he had little to do with operations and knew nothing at all about real estate (180). Moreover, the Vice President of Springfield, one Lou Lerner, was an accountant who handled the bookkeeping but had little to do with the company's daily affairs (1025, 1195), which involved the origination, processing, and servicing of real estate transactions.

These daily operations were closely supervised and directed by appellant, Stephen Rosenbaum, who hired, fired and supervised the solicitors,[5] expediters,[6] servicers[7] and general office personnel. (182, 184, 933, 1025, 1111, 1196, 1321).

The evidence at trial showed that in addition to his legal duties, appellant also controlled and directly par-

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[5] The solicitors helped originate deals by enticing speculators to use Springfield.

[6] The expediters helped process deals by seeing to it that they moved easily and speedily through the FHA and VA.

[7] The servicers made sure that arrears were paid on the mortgages.

ticipated in the widescale illegal activities engaged in by Springfield employees involving the payment of gratuities, bribes, and the making of various false statements on various required FHA and VA documents. For instance, between 1970 and 1973 Springfield employed Douglas Holmberg and Andy Hahn as "expediters". The term "expediter", however, was actually a poorly concealed euphemism, for, as one speculator bluntly put it, Doug Holmberg was a "bag man" (1074). Indeed, since both Holmberg and Hahn were close personal friends of Hugh McDonnell, a high VA official they later bribed at appellant's behest (634), it was no coincidence that when appellant interviewed Holmberg for the Springfield expediter's job, one of his main concerns was how well Holmberg knew Hugh McDonnell (1317).

1. Gratuities

Since many of the decisions required to be made by FHA and VA employees were subjective ones involving personal discretion, the federal employees' goodwill was crucial to the mortgage companies and their clients. For example, a borderline credit case might legitimately be accepted or rejected, or a particular house might legitimately be appraised in an amount ranging from $20,000 to $22,000. Threefore, due to the extreme importance of the outcome of these individual decisions, appellant made certain that whenever possible, Springfield purchased the necessary goodwill. Indeed, due to this aspect of their jobs, VA and FHA employees were warned, time and again, orally and by memoranda, that they were to accept no gifts from people who did business with their agency (See, e.g., 66, 134, 470, 522-523, 629). In fact, every six months VA employees were required to sign statements swearing they had received no gratuities during the preceding period (135). All

mortgage companies, including Springfield, received letters from the FHA stating that the giving of gratuities was prohibited (314). Nevertheless, as established at trial, appellant saw to it that the FHA and VA employees were well rewarded with various types of gratuities.

Perhaps the most blatant illegal gratuity proven was the $2000 in cash that appellant gave to Don Carroll, at the time the Director of the FHA Hempstead Insuring Office. Appellant initially requested the approval of the president of Springfield, Sanford Allinson, in giving the gratuity, and implied to Allinson that the money would be well spent on Springfield's behalf (239). When Allinson emphatically rejected any illegal payment to Carroll, appellant went ahead and delivered the money to Carroll without further informing Allinson (195). The $2000 was given to Carroll in a plain envelope which was delivered to him in the men's room of a diner located in Merrick, New York (320).

Appellant was equally generous to Bernie Fein, Chief of Mortgage Credit at the FHA. According to Doug Holmberg, appellant helped finance the medical school education of Mr. Fein's son (1306-1307).

Appellant's largess was also dispensed liberally to FHA and VA employees. At Christmas time, for example, he would slip $25 "gifts" under the table in the FHA conference room to various federal employees (545, 547, 548; see also 1207). He also instructed Holmberg and Hahn to give holiday gifts to other FHA and VA employees (470-471, 614, 1197). At appellant's direction, Andy Hahn would also pick up the lunch tab of FHA employees' "for helping out" (550, see also 545) and Holmberg would pick up checks for friendly after-

noon get-togethers at a local Elks Club for other FHA employees (1209). It should be noted that none of the federal employees gave reciprocal gifts to employees of Springfield (547-548). Indeed, Doug Holmberg never even received so much as a Christmas card from a federal employee (1207). That this gratuity was strictly a business proposition is illustrated by the fact that appellant, when preparing his Christmas list, asked Holmberg only for the names of the federal employees that Springfield "did business with" (1207).

The return to appellant for his largess was enormous. Even though Government experts testified there was "no way" a case could be processed in one day through the FHA or VA (66, 137, 313, 1013), Springfield was able to provide such service to its customers (See, e.g. 1049-1050). Doug Holmberg rarely found it difficult to "walk through" a file at the FHA (1208). And employees who had received free lunches or Christmas gifts testified that they had been only too glad to process Springfield cases immediately (See, e.g., 549). In fact, as the evidence established, Springfield was able to process all of its cases very quickly (See, e.g., 549, 615, 992). Appellant also developed a remarkable ability in being able to "persuade" Bernie Fein to override the credit rejections of Springfield applications which had been made by subordinates. In fact, appellant obtained approval of the very same cases that Bernie Fein had rejected when they had been earlier brought to him by Holmberg (1202, 1203, 1306, 1307). And the $2000 gratuity which had been given to Don Carroll apparently persuaded him to provide appellant with information concerning an investigation that Carroll had not given employees of other mortgage companies. (323)[8]

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[8] The Carroll transaction is treated in more detail under Point III of this brief.

2. Bribes

During 1972 the Government commenced a major investigation into corrupt practices at the FHA involving mortgage financing. As a result of this investigation there was, in effect, a competitive advantage given to any mortgage company that had an "in" at the VA. Because Springfield, as a result of appellant's activities, had such an "in" at the VA, it was able to obtain approval for the very same unsound mortgages which had been rejected by the FHA (817).

The key man in the scheme for Springfield was Hugh McDonnell, Assistant Chief Appraiser in charge of Construction and Valuation at the VA (135). At Rosenbaum's behest, Hahn and Holmberg paid McDonnell, $50 per case. In return, McDonnell would expedite cases for Springfield (615). More importantly, though, McDonnell would see to it that Springfield had an appraiser designated by Springfield assigned to appraise the particular property (615, 617). This procedure was referred to by the parties as "controlled assignments". Later, after McDonnell stopped taking monies from Springfield, Andy Hahn was able to locate a VA assignment clerk who agreed to take the payments in order to give Springfield the same controlled assignments (657).

The method of "controlled assignments" of these appraisers was quite simple: Appellant would tell his customers, i.e. speculators, to give Holmberg and, later, Hahn[9] $50 to obtain the controlled assignment from the VA (See, 818, 934). If the particular speculator did not have ready cash, appellant would advance or front the bribe money, which money would be repaid at the closing (See, e.g., 918, 920, 1200). Other times, the speculator would give the bribe money directly to appellant for him

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[9] Andy Hahn took over the job of expediter after Doug Holmberg voluntarily left Springfield.

to arrange the bribe payment to appropriate VA official (See, e.g. 917-918). Following receipt of such monies, appellant would then give the "expediter" this money together with a list of the properties involved and the appraisers who were to be assigned (1197-1198). If appellant or an expediter was not present at the Springfield offices, the speculator would leave the money and list with appellant's secretary, Pauline Schlam, to be passed on to the VA officials (See, e.g., 871, 935, 1199, 1323). The expediter would then take the money and the list and give both to the VA employee (617, 1197). After the scheme had been functioning for a while, Hahn was able to phone in his requests for the controlled assignments and pay later (657). Almost invariably, the speculator received the requested appraiser (See, e.g., 820, 934).

Thereafter, the speculator would meet the appraiser at the property and make payment to him of $50 to $100, which payment was usually made in the basement of the house being appraised (921). In order to insure favorable treatment for its customers (i.e. speculators), appellant would often call the designated appraiser and remind him to "take good care" of his friend when the speculator came to the property during the appraisal (732, 759, 796). In addition, when at the property, the speculator often would remind the appraiser that he came from Springfield (734).

The most important benefit of these payoffs was that they guaranteed against an outright rejection of the property which would have ruined the entire deal and left the speculator owning an uninsurable house (737, 755). Moreover, as an added bonus, the speculator would also receive an unrealistically excessive valuation on the house (See, e.g., 821, 922). The benefit to Springfield was, of course, obvious. Appellant was able to charge the speculator very high points for a "good job" (928;

see also 825, 935). In addition this "VA connection" was a big selling point in attracting further business to Springfield (See, e.g. 815, 893).

3. False statements to FHA and VA

Since the FHA and VA were greatly understaffed, both agencies relied on the mortgage companies to verify and to certify the myriad of statements that were required to be submitted (76, 94).[10] The Government's evidence in effect demonstrated that the FHA and VA had inadvertently made the goat the keeper of the cabbage patch. Moreover, repairs had to be certified as satisfactorily completed by the mortgage company (57, 74). And appellant himself was designated by Springfield to certify that the repairs were completed. Yet, the record shows that poorly completed repairs were routinely certified by appellant as satisfactorily completed. For example, one speculator made no repairs on his properties, yet appellant certified that the specified repairs were completed (1045). Indeed, even after an apparently honest Springfield employee repeatedly told appellant that the specified repairs were not being completed, appellant continued to certify that they had been accomplished (1113).

Numerous other false statements were certified to and submitted by appellant to the FHA and VA. One speculator who testified at trial, Alonzo Smith, routinely used ersatz or non existent buyers, false verifications, and false

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[10] In addition to the mortgage company, a credit agency selected by the mortgage company was supposed to verify employment, but Springfield was careful to select a credit agency that did its job no better than Springfield. In fact, Springfield's credit checking company was later suspended by the FHA for its incompetent work (124).

credits (1018-1025, 1093).[11] Astonishingly, *all* of this speculator's transactions with appellant involved fraudulent practices (1071). And it appeared from the trial testimony that such fraud was pervasive; appellant even directed his secretary to routinely sign his name to credit and repairs' verifications, even though he never asked her to check to determine if the statements verified were, in fact, accurate (1325). Indeed, it was only when the fraudulent practices became obviously blatant that appellant urged caution. For instance, after a particular speculator had used the same 6′ 10″, 175 pound "stand-in" as a buyer at closings on several occasions, appellant instructed the speculator not to use his (the speculator's) employees as buyers any more (1028-1029).

The head of servicing for Springfield, himself uninvolved and unaware, had so much trouble locating alleged buyers when he went to service Springfield accounts, that he suggested to appellant that he be permitted to sit in at closings in order instantly to be able to check credit and the buyer's identification. Appellant, however, rejected this request and also rejected this employee's monthly request to be permitted to have closer supervision of certain speculators doing business with Springfield (1109; 1118-1119).

Appellant did become alarmed when he noticed foreclosures of a large number of transactions relating to a particular speculator. Such foreclosure activity would be a red flag even to the understaffed FHA. Consequently, he devised a scheme whereby the speculator would "cover" for past deals by making the overdue mortgage payments

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[11] Alonzo Smith was recruited into the FHA real estate business and trained in how to engage in the illegal activities described in this statement of facts by a solicitor for Springfield (1019-1025).

with monies received from new closings (1035, 1039, 1100, 1117). Of course, the speculator was not responsible for mortgage payments, the buyer was responsible. But as appellant knew, since phony buyers had been used there were no real buyers to whom Springfield could look to cover the overdue mortgage payments.

These false statements produced profits for Springfield as lucrative as the payoffs for the bribery and gratuity connections because appellant routinely charged speculators additional points when the credit was either bad or entirely phony (See, e.g., 920, 996, 1029). For example, in one instance, appellant received $1500 directly from a speculator as a payoff for getting three particularly bad deals approved by the FHA (1031-1034).

4. The Berman transactions

In February 1972, a Springfield solicitor had met with two speculators, Samuel Berman and Irving Jablon, and tried to obtain their business by bragging about the connections that Springfield had with the FHA and VA and the benefits that could accrue from these connections. A meeting with appellant was scheduled for March 2, 1972. Soon after the solicitor left the office, Berman contacted the FBI.[12] With Berman's consent a tape recorder was concealed on his person, and the March 2, 1972 meeting between Jablon, Berman, appellant and the Springfield solicitor was recorded (1379).[13]

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[12] Jablon and Berman had acted as Government informers in the past involving illegalities in FHA insured real estate transactions, but they were not so acting at the time the Springfield solicitor came, unexpectedly, into their offices (1439-1440, 1442).

[13] The tape recording of this meeting had some long gaps in it due to a technical malfunction in the recorder. However, a transcript of the recorded portions was available. It was agreed

[Footnote continued on following page]

At this March 2, 1972 meeting appellant bragged about his close personal friendship with Donald Carroll [14] and Bernie Fein (1388-1389, 1432). He also bragged that he was able to have Springfield cases processed speedily through the FHA and VA and that one day service was "no problem at all" (1382; 1388-1389; 1432). Appellant also spoke extensively to Berman and Jablon concerning the handling of "problem" credit cases, even though the Government investigation of this area was becoming more intensive each day (1390, 1421). And, consistent with his fraudulent scheme, appellant informed Berman that Springfield would charge additional points to process these questionable transactions (1424-1425).

Most importantly, appellant told Berman that "I will get you any appraiser you need at the VA." (1382; see also 1383). Appellant also stated:

> "If I give you an appraiser, I will call you beforehand and let you know about it. I'll let you know that it's alright to give it to him." (1386)

Appellant then told Berman that he would have to make a payment to Springfield in order to obtain assignment of the particular appraiser and that he would also have to pay the appraiser $50 or $100 when he met him at the property (1383). Berman said he did not know how to pay the bribe to the appraiser, and the Springfield

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to between counsel that the Government witnesses would use the transcript to refresh their recollections about the exact statements made at the time of the meeting. Thus, at the trial most of the testimony about this meeting came as a result of the witness refreshing his recollection from the verbatim transcript of the audible portions of the tape.

[14] This meeting took place one week after appellant had given Carroll the $2000 gratuity.

solicitor replied that it was incredible that they had to tell Berman how to bribe appraisers. At this point appellant said that Berman was not as dumb as he looked (1384). Appellant had used the same arguments to persuade other speculators to do business with Springfield as he used with Berman and Jablon. (See, e.g., 725-728, 803-804). And as Jablon testified, appellant was able to back up his promises (1399).

At the March 2, 1972 meeting, Berman, as instructed by the FBI, submitted a property to appellant and the solicitor for Springfield's consideration. The next day at a meeting between the solicitor and Berman, this time without the appellant's presence, Berman gave another property to Springfield (1458). The solicitor directed Berman to issue two checks. One check was made out to pay the legal appraiser's fee and the subject properties were listed on the check. The other check was issued by Berman for $100 without any notation. This check was for the bribe which was to be paid to obtain the controlled assignments on the two properties submitted (1458-1459).

Subsequently, both cases were assigned to the very appraisers whom Springfield had promised Berman would make the appraisals (1474-1475). Unfortunately, Berman became incapacitated with a bad leg and was unable to meet the appraiser at the property to make the prescribed payment. (1463-1464). Thereafter Berman, not knowing what action the appraiser had taken with respect to the property, called to explain to the appraiser why he had not appeared. The appraiser, however, gave Berman what he described as a "brush-off" (1541-1542).

In late March 1972 Berman, accompanied by FBI Agent Thomas Jones who posed as a buyer for one of the properties which had been submitted to Springfield, met

with appellant at the Springfield offices. Both Jones and Berman were outfitted with recording devices and the conversation was recorded by them. The tape recordings were introduced into evidence and played at trial. (Gov't Appendix, pp. 21 et. seq). At this meeting, when Berman told appellant he had been unable to meet the appraiser, appellant said that he had received the money from the $100 check for the controlled assignment (1550-1551). However, appellant criticized Berman for failing to meet the appraiser at the property (1551). Appellant stated the appraiser had been cold to Berman on the phone because Berman had failed to make the expected payoff (1556). Appellant emphasized to Berman that it was essential to give the appraiser a "C" note (1562).[15]

Thereafter, appellant told the alleged buyer (Agent Jones) that he should make certain false entries on his credit application. For example, since the house had to be owner occupied, appellant stated as follows:

> You're going to live there right? I don't want to know if you're not. (1548).

Moreover, although appellant did not have any knowledge of Jones' financial situation, he told Jones that he would enter on the application that Jones owned $5000 worth of furniture (1653). Jones said that he did not have a bank account, but appellant directed that he sign blank

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[15] The day after this meeting, Springfield was notified that the appraiser had rejected the property (1561). Apparently the rejection was caused by Berman's failure to give the appraiser the expected bribe. In fact, at the meeting appellant had berated Berman ". . . if you don't take care of these guys, they will knock your fucking brains out . . . it's quite understood that they (sic) got to meet him there, you know. If they don't, you know, he doesn't give a fuck, he calls it as he sees it. Don't you understand that?" (Gov't. Appendix, pp. 73-74).

bank verification forms (1655). Appellant also required Jones to sign blank credit application forms even though on the face of the form was a statement that the form was not to be so signed (1657). Finally, appellant instructed agent Jones to state that he did not have an outstanding automobile loan, even though Jones had informed appellant he had such a loan (1560, 1653).

ARGUMENT

POINT I

Wharton's rule does not prohibit prosecution for a conspiracy to give bribes and gratuities and a conspiracy to give gratuities where each conspiracy involved co-conspirators in addition to the actual givers and recipients.

Appellant argues that Wharton's Rule prohibits a prosecution for conspiracy to give bribes and gratuities and a conspiracy to give gratuities even though there were more than two parties to each conspiracy. This result is required, so the argument runs, because "if there is one party together with other parties to arrange the bribe [or gratuity] or one or more receivers, each wing constitutes an entity so that there really are only two parties involved in the crime" (App. Brief, p. 14). The District Court, by a post-trial memorandum decision and order, rejected appellant's claim, holding that:

> "The argument based on what is said of 'Wharton's Rule' in *Iannelli* v. *United States*, 1975, 420 U.S. 770, has no application to Counts 1 and 4. It could apply (and then only conditionally) if the Counts charged only the giver and receivers of the bribes and gratuities. The Counts are not of that sort. Each charges a conspiracy involving others than givers and receivers" (Gov't Appendix p. 20).

It is submitted that Judge Dooling's analysis was correct and that, therefore, appellant's conviction on the conspiracy counts, which is unchallenged on the evidence, was proper.

The proper application of Wharton's Rule was at issue in *Iannelli* v. *United States*, 420 U.S. 770 (1975), where the Supreme Court held that the Rule did not proscribe a prosecution for conspiracy to violate the federal gambling statute, 18 U.S.C. § 1955, even though the substantive crime required the participation of five or more persons.

The *Iannelli* case, quoting Francis Wharton's classic treatise, set forth Wharton's Rule:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. . . . In other words, when the law says, 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense—e.g., adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy." (420 U.S. at p. 773).

Moreover, *Iannelli* pointed out that "[a]n exception to the Rule generally is thought to apply in the case in which the conspiracy involves more persons than are required for commission of the substantive offense." (420 U.S. at p. 783, n.15). The Rule, therefore, traditionally has applied to offenses such as adultery, incest, bigamy and duelling; offenses, "the immediate consequences of which", as the

Court put it, "rest on the parties themselves rather than on society at large" and where "the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert." (*Id* at pp. 782-783). Thus, the Court held that the Rule should be treated as a judicial presumption that the conspiracy and the substantive offense merge into a single crime unless there is "legislative intent to the contrary" (*Id* at p. 781). It is submitted that a consideration of all these factors shows that the Rule has no application to the instant appeal.

First, the conspiracies charged involved more than the minimum number of persons necessary to commit the substantive offenses. The conspiracies were widespread and included individuals beyond the givers and receivers. See *United States* v. *Zeuli*, 137 F.2d 845, 846 (2d Cir. 1943). Indeed, the conspiracies to give bribes and gratuities to VA officials (Count 1) and gratuities to FHA officials (Count 4) involved 12 named unindicted co-conspirators as well as 23 unnamed co-conspirators.[16] These persons included brokers, secretaries, clerks, expediters, officers of Springfield Corporation, and various VA and FHA officials.

This case, then, is similar to *United States* v. *Bommarito*, 524 F.2d 140 (2d Cir. 1975), a post-*Iannelli* decision involving a conspiracy to distribute narcotics. In *Bommarito*, this Court held that Wharton's Rule did not apply to a conspiracy that contemplated "an ongoing activity in which there would be additional sales" (*Id.* at p. 145). So too here the bribes and gratuities involved were not of a one-time nature between a specified giver

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[16] The identities of the unnamed co-conspirators were disclosed prior to trial (Govt. Appendix, pp. 15-16).

and a specified recipient, but were on-going illegal transactions conducted between constantly changing individuals. The dynamics of this conspiracy were such that the different buyers, speculators, and appraisers were continually joining and leaving the conspiracy whose core participants remained constant.

Second, the effects of the giving of the bribes and gratuities rediated far beyond the actual giver and receiver. Such corrupt practices, of course, directly affected the commonweal. The Court stated in *Iannelli*, concerning the gambling offenses in question, that "unlike the consequences of the classic Wharton's Rule offenses the harm attendant upon the commission of the substantive offense is not restricted to the parties to the agreement." (420 U.S. at 784). The same argument could be made even more forcefully concerning the conspiracies involved in the instant case.

Certainly, the complex of corrupt practices here envisaged the constant inclusion and participation of additional persons, who themselves were only transient members of the corrupt agreement. And, even though these and many others were certainly involved, the levels of culpability differed vastly between the participants, e.g., an unqualified buyer who sought to obtain necessary financing in order to purchase a family home and appellant who managed, supervised, directed, initiated, and substantially benefitted, on an on-going basis, from the illegal scheme. Thus, this situation is analogous to *Iannelli*, where the Supreme Court held that "[i]t might, therefore, be appropriate to prosecute the owners and organizers of large-scale gambling operations both for the conspiracy and for the substantive offense but to prosecute the lesser participants only for the substantive offense." (420 U.S. at 784).

Third, turning to the legislative intent, it does not appear that Congress intended to proscribe the use of the conspiracy section, 18 U.S.C. § 371, in bribery and gratuity cases. Again, following the analysis set forth in *Iannelli*, it is necessary to examine the substantive crimes, as defined in 18 U.S.C. § 201(b) and (f). In defining these crimes Congress pointedly avoided any reference to a conspiracy or an agreement between two or more persons to commit the unlawful act, the essential element of conspiracy. See *United States* v. *Iannelli*, *supra*, 420 U.S. at 789. Moreover, the substantive offense of offering or giving a bribe or gratuity does not *require* concerted criminal activity, that is, more than one criminal participant. *Id.* at 785. The substantive offense is complete when the offer is made, even if refused by the recipient of the offer. The substantive offense is complete when the money is given to the recipient, even if taken not with any unlawful intent but in cooperation with an investigation by federal law enforcement agencies.

Moreover, the purpose of the statute is "to protect the public from the evil consequences of corruption in the public service." *Kemler* v. *United States*, 133 F.2d 235, 238 (1st Cir. 1942). Or, as this Court put it in *United States* v. *Jacobs*, 431 F.2d 754, 759 (2d Cir.), *cert. denied*, 402 U.S. 950 (1970):

> The evil sought to be prevented by the deterrent effect of 18 U.S.C. § 201(b) is the aftermath suffered by the public when an official is corrupted and thereby perfidiously fails to perform his public service and duty. Thus the purpose of the statute is to discourage one from seeking an advantage by attempting to influence a public official to depart from conduct deemed essential to the public interest. As Judge Hastie aptly stated in United States

> v. Labovitz, 251 F.2d 393, 394 (3 Cir. 1958): 'It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore, society deals sternly with bribery which would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision.

Under all these circumstances the *Iannelli* analysis is again controlling:

> "Had Congress intended to foreclose the possibility of prosecuting conspiracy offenses under § 371 by merging them into [201(b) or (f)], we think it would have done so explicitly. It chose instead to define the substantive offense in a manner that fails specifically to invoke the concerns which underlie the law of conspiracy." (420 U.S. at p. 789).

Appellant seeks to avoid the impact of the *Iannelli* case by citing to *United States* v. *Sager*, 49 F.2d 725 (2d Cir. 1931), in which this Court held that Wharton's Rule prohibited a conspiracy "to commit bribery between persons, one charged with the intended taking and several charged with giving the same bribe." (*Id.* at p. 727). Beyond the obvious distinction between *Sager* where all the parties had actually given or taken the bribe and the instant case where several of the co-conspirators neither gave nor received the bribe, but rather participated in the over-all scheme, the *Sager* case, where inconsistent with *Iannelli* if at all, is simply no longer good law.

But more importantly, in relying on *Sager*, appellant failed to cite footnote 9 of the *Iannelli* opinion (420 U.S.

at p. 776). This footnote appears following a reference in the opinion to *United States* v. *Becker*,[17] a case which involved the federal gambling laws and in which this Court permitted a conspiracy prosecution where there were more than 5 persons involved. Footnote 9 states:

> [*United States* v. *Becker*] appears to represent a departure from the Second Circuit's earlier view. The conspiracy charge dismissed in *United States* v. *Sager*, 49 F.2d 725 (CA 2 1931), involved agreements by more than two persons to commit substantive offenses that could have been consummated by only two. In that case, however, the Second Circuit determined that Wharton's Rule precluded indictment for both offenses.

Apparently, therefore, the Supreme Court read the *Becker* case to have, *sub silentio*, overruled, or at least severely limited, *Sager* to the traditional two-party Wharton Rule situation. (But compare, *United States* v. *Frank*, 520 F.2d 1287, 1290 (2d Cir. 1975), *cert. denied*, 423 U.S 1087 (1976). Thus, reading the *Iannelli* decision itself, appellant can derive no support on this appeal from the *Sager* case.[18]

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[17] 461 F.2d 230 (2d Cir. 1972), *vacated and remanded on other grounds*, 417 U.S. 903 (1974).

[18] Indeed, the broad wording in *Sager*, that "where concert is necessary to an offense, conspiracy does not lie" (49 F.2d at 727), would appear, if literally applied, to void a conspiracy charge where the substantive act requires the participation of two or more parties such as in bribery or narcotic cases. Yet the number of successful prosecutions for these types of conspiracies, where the Wharton issue has not ever been raised, are legion. *See, e.g., United States* v. *Gentile and LaPonzina*, 525 F.2d 252 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1493 (1976); *United States* v. *Brasco*, 516 F.2d 816 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975); and *United States* v. *Bommarito*, 524 F.2d 140 (2d Cir. 1975). Moreover, in a series of post-*Sager* cases, this Court has applied the "Third Party Exception Rule," that where more than the minimal necessary number of people needed to commit

[Footnote continued on following page]

It should also be noted that unlike *Bommarito*, *Brasco*, *Sager*, *Iannelli* and the other cases cited above, the Government in the instant case did not charge appellant with both substantive and conspiracy counts arising out of the same transaction. It charged him only with conspiracy.[19] Since there was no dual punishment on both a conspiracy and substantive count arising out of the same transaction, the problem raised by Wharton's Rule is not present in this case, and appellant is not entitled to dismissal of the conspiracy charge. See *United States* v. *Iannelli*, *supra*, 420 U.S. at 786, n.18.

The seminal Wharton's Rule case of *Shannon* v. *Commonwealth*, 14 Pa. 226 (1850), involved a man who was

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the substantive offense were involved, Wharton's Rule would not prohibit the bringing of a conspiracy charge. *See, e.g., United States* v. *Becker, supra; United States* v. *Fino*, 478 F.2d 35, 38 (2d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); *United States* v. *Benter*, 457 F.2d 1174, 1178 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972). This exception to Wharton's Rule appears to have maintained its vitality even after *Iannelli*. See, *United States* v. *Bommerito*, *supra* 524 F.2d at 144. In any event, the "Third Party" exception decisions clearly narrowed the broader application of the *Sager* case even before the *Iannelli* case was decided.

[19] In *Iannelli*, the Supreme Court noted that even before *Becker* apparently overruled *Sager*, *Sager* required only that a defendant not be indicted for both the substantive count and the conspiracy. (420 U.S. at 776, n.9). Hence, even if *Sager* was still valid today, it would not help appellant in the instant case.

Counts 2 and 3 were the substantive counts in the indictment. Count 2 charged appellant with giving a gratuity to the Director of the Hempstead office, which was one of the numerous gratuities included in the proof of the conspiracy charge (Count 4). Count 3 charged appellant with offering a bribe to Rose Cohen, an F.H.A. employee. The Count 4 conspiracy, the only one dealing with F.H.A. employees, did not charge appellant with the giving of bribes. Therefore, Count 3 was not included in the conspiracy charged in Count 4.

acquitted of adultery and subsequently convicted of conspiracy to commit the same adultery. That case clearly involved overtones of double jeopardy. However, the *Iannelli* Court held that Wharton's Rule is bottomed on a judicial presumption and not on double jeopardy considerations (420 U.S. at 782). But even those who consider Wharton's Rule to involve the double jeopardy clause (*See, e.g., Id.* at 791, 792, Douglas *J.* dissenting; *United States* v. *Schaeffer*, 510 F.2d 1307, 1313, n.10 (8th Cir.), *cert. denied*, 421 U.S. 978 (1975) should have no qualms about affirming the conviction in the instant case since, in their view, the Government should be required to bring either a conspiracy or a substantive charge, but not both. *Iannelli* v. *United States*, *supra*, 420 U.S. at 792 (Douglas *J.* dissenting). In the instant case, the indictment charged only the conspiracy offenses.

It is submitted that the conviction of appellant for each of the conspiracies charged was not prohibited by Wharton's Rule. The *Iannelli* analysis of the facts of this case establishes that the wide-ranging conspiracies charged in the indictment, both of which occurred over periods exceeding one year, and which involved numbers of individuals in addition to the givers and receivers of the bribes and gratuities, did not merge with the substantive offenses. Accordingly, the claimed error should be rejected.

POINT II

The pre-indictment delay did not result in a denial of due process.

Relying on *United States* v. *Marion*, 404 U.S. 307 (1971), appellant asserts that his conviction should be reversed and the indictment dismissed due to the lapse of almost three and one-half years between the date the Government initiated its investigation (which approxi-

mately coincides with the date of the last overt act in Count 1) and the date the indictment was filed. This result is required, according to appellant, because of the substantial prejudice that allegedly accrued due to the Government's failure to promptly file the instant indictment.

This claim was raised below, both before and following the trial, and on both occasions was rejected by the trial court. Indeed, in a pretrial memorandum Judge Dooling set forth his reasons for denial of the motion:

> Defendant's motion to dismiss the indictment because of pre-indictment delay is denied as "speculative and premature"; if events at the trial appear to demonstrate actual prejudice, the issue should be reopened for reconsideration at the close of the evidence. *United States* v. *Marion*, 1971, 404 U.S. 307, 326. At this time what appears from the affidavits is simply that the indictments were filed within the limitary period fixed by Congress, and that the delay in indictment for some three years after the point at which the Government might have indicted on the evidence then in hand is not ascribed to any decision on the Government's part to delay for the purpose of achieving a tactical or strategic advantage or any more general calculation that time worked in its favor rather than in defendant's. Accepting at face value what defendant has said in his affidavit of February 3rd, 1976, it is not apparent that loss of the possible witnesses Lustig, Gelman, Levine, Levoy and Solomon will disadvantage him; the contrary is as easy an inference. The unavailability of the living witnesses appears unreal; nationwide process is available to secure their attendance if any of them are material witnesses and could be helpful to defendant. The Government, meanwhile—and it has the

burden of proof—has lost one clearly material witness, Andrew Hahn, a co-conspirator whom it had intended to call as a witness (see Count 1, overt acts 2, 5; Count 4, overt act 2).

No more appears than that the exhaustive work on the whole "housing scandal" has built evidence to the point at which the Government is now ready to proceed in the belief that the evolution of the whole set of indictments, pleas, etc., has at length put it in possession of sufficient evidence to proceed with confidence. *Cf. United States* v. *Finkelstein*, 2d Cir. 1975, Slip Opinions, Sept. 1975 Term, 841, 856. *United States* v. *Barket*, 8th Cir. 1976, F.2d , does not reflect the approach of the Second Circuit. *Cf. United States* v. *Foddrell*, 1975, 523 F.2d 86; *United States* v. *Frank*, 1975, 520 F.2d 1287, 1292; *United States* v. *Brown*, 1975, 511 F.2d 920, 922-923. (Gov't Appendix, pp. 12-14).

Following the trial, which lasted two weeks, Judge Dooling reconsidered the *Marion* motion and again denied it, stating that "[t]he trial has not altered the balance of considerations in [appellant's] favor" (Gov't Appendix, p. 20).

The Government contends that the denial of the *Marion* motion was correct.

The investigation which led to the indictment in the instant case commenced in March 1972, as part of a larger investigation into corrupt practices involving the federal mortgage program in metropolitan New York. Concededly, and as set forth in the Government's affidavit filed in opposition to the *Marion* motion below (Govt. Appendix, pp. 1-10), appellant was offered a plea in 1972, which he refused. It was also conceded that, at the time,

there was probable cause for an indictment; however, in the opinion of the prosecutors handling the investigation, the available evidence fell short of that necessary to successfully prosecute the charges. Indeed, it was not until January 1975, following several convictions that were obtained in industry-related prosecutions, that significant progress was made in obtaining witnesses for this case. Following this turn of events the investigation became fruitful, and on November 12, 1975, the indictment was filed.

Initially, it should be noted that the mere fact of delay in bringing an indictment does not, itself, require a dismissal *e.g.*, *United States* v. *Frank*, 520 F.2d 1287, 1292 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976). What is required is that a defendant, in addition to showing pre-indictment delay, make a showing that there was actual prejudice to his defense. *United States* v. *Marion*, *supra*, 404 U.S. at 325; see also, *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972). There must also be a showing that the delay was designed to harass the defendant or to obtain some tactical advantage over his defense. *United States* v. *Marion*, *ibid*; *United States* v. *Foddrell*, 523 F.2d 86, 88 (2d Cir.), *cert. denied*, 423 U.S. 950 (1950); *United States* v. *Mallah*, 503 F.2d 971, 989 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). It appears that together with the demonstration of prejudice, there must be a showing of prosecutorial misconduct in causing the delay; or in other words, prejudice alone is insufficient. *United States* v. *Eucker*, 532 F.2d 249, 255 (2d Cir. 1976); *United States* v. *Schwartz*, 535 F.2d 160, 164 (2d Cir. 1976); *United States* v. *Brasco*, 516 F.2d 816, 818 (2d Cir. 1975); *United States* v. *Brown*, 511 F.2d 920, 922 (2d Cir. 1975). Finally, if a defendant has had notice, directly or otherwise, of the investigation which led to the charges, this advance warning "effectively undercuts any claims that [he] was prejudiced by the delay." *United States* v.

Rubinson, — F.2d —, slip op. 3119, 3138 n.26 (2d Cir., April 8, 1976); *United States* v. *Feinberg*, 383 F.2d 60, 66 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968).[20]

Turning now to appellant's claim, it need be initially pointed out that appellant conceded below that there was no prosecutorial misconduct:

> "Firstly in no way and in no wise am I alleging prosecutorial misconduct. The allegation at its best is prosecutory omission not commission. So Im not accusing any members of the United States Attorneys Office of—to use the colloquial expression—of sitting on the case in hope that defense witnesses would not be available. Omission is quite a different situation than commission." (Transcript of hearing of January 28, 1976 pp. 17-18).

The omission referred to, as we understand appellant's argument, appears to be a claim that the Government improperly failed to seek the indictment in 1972 when there was, concededly, probable cause to do so. However, while at the time there may have been probable cause to obtain an indictment there was not, in the opinion of the prosecutors, adequate evidence for a prosecutable case.

The complained of failure to obtain an indictment before the Government determined that the case was, indeed, prosecutable is not improper conduct. This was recognized by the Supreme Court, where in a somewhat different context, the Court held "Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum

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[20] Appellant concedes he had notice that he was under investigation concerning those matters since March of 1972. (Appellant's App. p. 16).

evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966). See also *United States* v. *Rubinson, supra*, at 3138; *United States* v. *Feinberg, supra*, 383 F.2d at 64-65.

It is also evident that appellant has completely failed to meet his burden of proving he was actionably prejudiced by the delay. *United States* v. *Finkelstein*, 526 F.2d 517, 525-526 (2d Cir. 1975). Although appellant baldly asserts prejudice, there was none. The personal financial hardships may have been unfortunate, but they are not relevant to the issue which concerns prejudice to his defense.

Appellant claims that he was somehow prejudiced by certain missing documents. However, he does not identify these documents nor indicate in what way their unavailability was related to the preindictment delay (Appellant's Brief, p. 5). Although the allegedly missing documents were never identified, appellant claimed that they were in the possession of the Government. In response, the Government offered appellant an opportunity to search its FHA-VA records storage room; however, appellant did not accept this offer.[21] (Transcript of January 28, 1976 hearing, pp. 24, 42, 45, 52; Transcripts of March 25, 1976, hearing pp. 7-8).

Appellant also contends that he was prejudiced due to the unavailability of certain witnesses. As the record

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[21] During the investigation, the books and records of Springfield, including certain specified case files, were subpoenaed, but not all of the requested records were produced. All of the Springfield subpoenaed records were available to the defense. (1148-1150).

shows and the District Court found, appellant failed to support its claim of prejudice [see also Govt. App. at 7-8]. Moreover, as noted earlier appellant was aware of the nature of the investigation from its inception in March of 1972. In fact, the District Court held that it was the Government which was prejudiced by the delay due to the death of a material co-conspirator witness.

Finally, the primary reason for the delay should be considered, i.e., the difficulty that the Government had in obtaining trial witnesses.[22] Thus the difficulty in locating witnesses to testify in cases involving "white collar" crimes cannot be ignored and is a factor that is to be considered. *United States* v. *Rubinson, supra* at 3137.

Inasmuch as the preindictment delay in this case was not due to improper prosecutorial conduct and there was no demonstrable prejudice, there has been no denial of due process mandating dismissal of the indictment. See *United States* v. *Payden*, — F.2d —, slip op. 4053 (2d Cir. June 8, 1976). Accordingly, the conviction should be affirmed.

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[22] For instance, a crucial Government witness, Pauline Schlam, appellant's personal secretary, initally denied any knowledge of illegal activity to the F.B.I. in 1973 and did not agree to testify truthfully until the summer of 1975. (1323, see also 1331, 1340). Another instance concerned Charles Assatlee, assignment clerk in the VA, who was bribed by Andy Hahn at the direction of appellant. He also initially lied when interviewed by the FBI. He thereafter was given immunity and still lied to the Assistant United States Attorney. It was not until mid-1975 that he became truthful and agreed to testify (676). A last illustration concerned Sonny Faranella, a major customer and close personal friend of appellant's who also lied to the Government several times after being granted immunity. (949, 951) In addition, he advised appellant what he had gleaned about the strength of the Government's case. It was not until September 1975, that he agreed to testify truthfully (912, 938-940).

POINT III

The evidence to support the conviction on Count 2 of the indictment was overwhelming.

Appellant claims that there was insufficient evidence to convict him on Count 2 of the indictment, charging the giving of a gratuity to Donald Carroll, the Director of the Hempstead Insuring Office of the FHA. Appellant made the same argument at the close of the Government's case. The trial court (Dooling *J.*) reflected the overwhelming nature of the evidence in its statements when it denied appellant's motion to dismiss Count 2 for lack of evidence:

> THE COURT: I think that the way we have to look at it is that this man had become the director of the Hempstead Insurance office of the Federal Housing Administration. Through that office the Springfield organization, in which Mr. Rosenbaum was interested, was processing a great many cases. When the matter came up, it was taken up by Mr. Rosenbaum. Not with his wife and children, but with his partners in Springfield. The money was that of Springfield. Not Mr. Rosenbaum's inherited money, his wife's money or anything else. Business funds were used.
>
> Now, in all these things—when all these things are put together, I think the jury would be authorized to determine that the payments were made for, or because of official acts performed or to be performed by the public official.
>
> You remember, we again have to read this against the backdrop of B. We mustn't ever forget that. I think we have to have in mind, too, that I believe the—there were questions asked by Mr. Gould —and I don't know that there's any evidence that

this idea was brought home to Mr. Rosenbaum, but that Carroll tackled nobody but people in the industry. He did not tackle his sister or his cousin. (1728-1729)

An analysis of the facts of the case and the applicable law will demonstrate that the evidence of guilt on Count 2 was more than sufficient; it was overwhelming.

(1)

In November of 1971, Donald Carroll was appointed Director of the Hempstead Insuring Office of the FHA (293). In that position he had the ultimate power to control what went on in his region concerning sales and purchases of F.H.A. insured homes.

Before coming to the F.H.A., Mr. Carroll worked in a bank where he had, without authority, issued a large number of mortgage commitments in the bank's name. Due to economic factors, the value of the mortgages dropped to the point where the mortgage commitments were worth about $30,000 less than they were when Mr. Carroll issued them (389).

Upon being appointed to his position with the F.H.A., Mr. Carroll clandestinely solicited several mortgage company officers doing business with the FHA in an attempt to have them assume the mortgages along with the accompanying losses. Some helped him out and some did not (381).

In February of 1972, Carroll asked appellant to assume some of the mortgages. Appellant said he would have to discuss the matter with his fellow officers (i.e., Lou Lerner and Sanford Allinson) (317). At that time Carroll knew appellant only by having had a business

lunch with him several years earlier. He never had any social contacts with appellant, nor had he borrowed or asked to borrow any money from appellant before the transaction in issue occurred (315-316).

When appellant told Allinson of Carroll's request, Allinson replied "you must be insane to give a federal official any money" (195). Allinson emphatically denied appellant's request that Springfield assume some of the mortgage commitments (196). Appellant then requested that Springfield give Carroll some money, $1000 or $2000, to help cover the $30,000 that the commitments had lost in value since Carroll issued them. Allinson again emphatically refused (196-197). Allinson thought that was the end of the matter, since appellant never told Allinson that he later gave the money to Carroll (198).

After this meeting, appellant contacted Carroll and told him he couldn't pick up the mortgages, but he could give him $2000 to help offset the point spread (318). At appellant's suggestion, Carroll met appellant late in February on a Saturday morning in a diner in Merrick, New York (319). Again at appellant's suggestion he and Carroll entered the men's room of the diner where appellant slipped Carroll $2000 in an envelope (319, 320, 324).

The money was paid to Carroll in cash. The check that was used to obtain the money was written out to cash on a check drawn to a business subsidiary of Springfield. The check was signed by Lou Lerner and appellant, and was marked off on the company books to "Miscellaneous Expenses", one-third chargeable to each officer (1351).[23] Allinson had not authorized anyone to draw

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[23] Interestingly, it was not marked under "loans" as was some money that Allinson had loaned to a banker doing business with Springfield (1350).

the check, even though it was partially charged against him (203).

Although appellant never conditioned the giving of the money on any *quid pro quo* from Carroll [24] (347-349), it was clear as Carroll testified on cross-examination: "The money was given to me because of who I was" (350). Mr. Carroll later responded to further probing by appellant's counsel that "he wouldn't have given me the money if I was Don Carroll, a fish monger" (351).

After returning from the men's room to their table in the diner, appellant quizzed Carroll at length about the nature and scope of the Government's investigation, with particular emphasis on any Springfield files the Government might be looking into. Carroll readily told appellant all he knew, even though he had not shared such information with any other mortgage company employees or officers (323). Carroll testified he replied readily to appellant's query because:

> "I would discuss anything with Mr. Rosenbaum at that point . . . because I just received some money. I said I need it and would have said anything—discussed anything." (323).

Later, one month after appellant had purchased Mr. Carroll's goodwill, the Government recorded a conversation between appellant and a person appellant thought was a prospective speculator-customer but who was, in fact, an individual cooperating with the Government. In the course of his sales pitch, appellant severaly times emphasized that the F.H.A. Director was his good friend (1388). In fact, appellant even called Carroll at his office to prove how well he knew Carroll. (*Id.*) [25]

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[24] Therefore appellant was not charged with giving a bribe.

[25] Carroll was not in at the time.

(2)

Appellant claims that the evidence was insufficient to convict on this count because there was no proof that the money was given ". . . for or because of any official act performed or to be performed by such public official . . ." (Appellant's Br. p. 19).[26] Appellant appears to read 18 U.S.C. § 201(f) as if it required the money to be given in connection with a specific act and a specific request by appellant. However, such is not the law.

As the Government contended below, the "official act" wording serves to distinguish a gift given to a federal official *qua* friend as opposed to one given to him *qua* a government official (1716-1717); the issue which the jury had to decide was whether appellant gave Carroll the money because he was an FHA official, or whether he would have given Carroll the money even if Carroll had not been so employed (1727).

The court concurred in this interpretation concerning whether a gift is given because of friendship or because

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[26] Appellant also cites issues relating to whether the payment was a loan and possible extortion by Carroll. There was no testimony as to any extortion or pressure of any kind put by Carroll on appellant. Also, Carroll denied the money was a loan (341, 343). Nor were these issues raised at the time the charge was reviewed. Nor do they relate to the sufficiency of the evidence, appellant's issue on this point on appeal. In any event, whether or not the payment was a loan is irrelevant (*United States* v. *Blitz*, 533 F.2d 1329, 1345 (2d Cir. 1976). *United States* v. *Deutsch*, 451 F.2d 98, 114-115 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). Similarly though extortion is a defense to the specific intent element of a bribery charge (*United States* v. *Kahn*, 472 F.2d 272, 278 (2d Cir. 1973)), extortion or economic duress is not a defense to a gratuity count. *United States* v. *Barash*, 412 F.2d 26, 29 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969).

of the recipient's official position. "[B]ut if what triggers the generosity is the holding of public office, I think it's forbidden." (1713). The Court added that it was, of course, uncontested that Carroll had a functional relation to appellant's economic interests (1715).

Any other interpretation of the "official act" wording of § 201(f) would in effect require the Government to prove intent to influence, a requirement clearly part of § 201(b) but not § 201(f). *United States* v. *Harary*, 457 F.2d 471, 475 (2d Cir. 1972). The gratuity subsection of § 201, that is (f), prohibits paying a public official a sum which he's not entitled to receive whether or not there is any intent to influence his actions. *United States* v. *Umans*, 368 F.2d 725, 730 (2d Cir. 1966). It is illegal to give a federal official a gratuity even if the donor does not intend to receive any favors in return, because the giving of gratuities brings about preferential treatment subtlely even if not so intended. *United States* v. *Irwin*, 354 F.2d 192, 196 (2d Cir. 1965). Further, the Court in *Irwin* pointed out (354 F.2d at 197):

> "It is not necessary for the Government to show that the gift caused or prompted or in any way affected the happening of the official act or had anytning to do with its nature or extent or the manner or means by which it was performed."

The contested wording of subsection 201(f) was precisely and accurately defined by the court in its charge, to which appellant did not take excetpion:

> The statute, the instruction just given, and the language of Count 2 require that the "thing of value" be given to the public official "because of any official act performed or to be performed by such public official." You will notice that it does not say anything about getting the public official

> to do something illegal, or something that, but for the giving of the thing of value, he would not have done, or would have done directly. On the contrary, the statute prohibits giving some of value to an official simply "because of" his past or future official acts. That is, the giving of the thing of value is forbidden if it is being given because the official has performed some official act or because he is to perform it wholly without reference to whether or not any specific thing has been requested or exacted by the person giving the thing of value. The statute is violated if a public official has been given money, for example, for doing exactly what he is supposed to do it, because the integrity of government requires that no things of value be paid to public officials in connection with their performance of their services other than fees provided by law and the salaries that the government pays to them. (Appellant's Appendix pp. 222-223).

All of the evidence in the case points inexorably to the conclusion that the money given to Donald Carroll was given to him because of his position at the F.H.A. As the District Court stated, it was a business transaction from start to finish (1728-1729). Further, the great pains which appellant resorted to in order to hide the transaction before,[27] during,[28] and after[29] its occurrence

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[27] The check was made out to cash and not listed as a loan on the company books (1350).

[28] At appellant's request the money exchanged hands in the men's room of a diner (319-324).

[29] About six months after the gratuity was paid, Don Carroll agreed to cooperate with the Government. The FBI placed a body recorder on him, and he went to meet appellant. Appellant denied even knowing about the exchange of the money (Appellant's Appendix at p. 58).

also demonstrated that appellant, an attorney, knew the transaction was illegal.[30]

Since the evidence supporting the conviction on Count 2 was overwhelming, appellant's claim that his conviction on that count should be overturned should be denied.[31]

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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[30] In fact the President of Springfield, Sanford Allison, a non lawyer, vehemently refused to authorize the transaction precisely because he knew it was an illegal transaction (See 195-196).

[31] Appellant's arguments relating to Title 18 U.S.C. § 209 (Appellant's Br. pp. 20-21) do not appear to be germane to the issue at hand. In any event they were well refuted in the trial court's post trial memorandum. (See Gov't Appendix, pp. 18-19).

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AFFIDAVIT OF [illegible]

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 22nd day of September, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, two copies of the Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Michael S. Washor, Esq.
16 Court Street
Brooklyn, N. Y. 11241

Sworn to before me this
22nd day of September, 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977

Lydia Fernandez

LYDIA FERNANDEZ